No. 18241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID FARRELL, *et al.*,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT DAVID FARRELL.

JAMES A. POORE,
610 South Broadway,
Los Angeles 14, California,

ROBERT G. CLEGHN,
Suite 709,
458 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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OPENING BRIEF OF APPELLANT DAVID FARRELL.

Jurisdiction of Trial and Appellate Courts.

From his conviction by a jury on an indictment[1] charging violations of the fraud provisions of The Security Act of 1933,[2] the Mail Fraud Statute[3] and for conspiring to violate these statutes,[4] and from the Judgment thereon [R. 4390-4392], David Farrell respectfully appeals.

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[1]*United States of America v. David Farrell, et al.,* U. S. District Court, Southern District of California, Central Division, No. 30341-CD [Clk. Tr. 119 *et seq.*] filed December 20, 1961 and plea of "not guilty" made to all 34 counts [R. P-10]. Jury's verdict April 16, 1962 [Clk. Tr. 505-508] and judgment filed May 14, 1962 [Clk. Tr. 558-559].

[2]15 U. S. C. A. §77q(a)(1). Counts One, Two, Four through Seventeen. Count Three was dismissed [R. 3046].

[3]18 U. S. C. A. §1341. Counts Eighteen through Thirty-Two. Count Thirty-Three was dismissed [R. 3046].

[4]18 U. S. C. A. §371. Count Thirty-four.

The District Court had jurisdiction of the trial[5] as does this Court of this appeal.[6]

Statement of the Case.

After approximately six weeks of trial, some 4,400 pages of Reporter's Transcript of trial testimony and the introduction of thousands of exhibits, with much repetition, David Farrell and his brother O. J. Farrell[7] were found guilty, in effect, of having devised a scheme and conspired to defraud customers of Los Angeles Trust Deed & Mortgage Exchange [LATD] and/or its parent corporation, Trust Deed & Mortgage Exchange and affiliate companies.[8] That the United States mail was involved was admitted.

As to Counts One through Seventeen, the jury also found there was a "security" involved in what was being offered and/or sold to the public by the defendants. What, if at all, that "security" consisted of, was in serious dispute [R. 4311-4313; see also Vol. 22, pp. 3701-3705, N. B. Vol. 23 has duplicate pagination]. The Government's contention being the trust deeds sold were not only "investment contract"[9] but also "notes" or "evidences of indebtedness" under the provisions of

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[5]15 U. S. C. A. §77v(a) and §77t(b) as to Counts One, Two, Four through Seventeen; 18 U. S. C. A. §3231 and Fed. Rules Cr. Proc. Rule 18, U. S. C. A. as to the remaining counts.

[6]28 U. S. C. A. §1291.

[7]A co-appellant herein by separate brief.

[8]Trust Deed & Mortgage Exchange (TD&ME); Trust Deed & Mortgage Markets (TD&MM); Colorado Trust Deed & Mortgage Markets (CTD&MM).

[9]As the 2nd trust deed sold during the period were held to be in the civil action preceding this criminal case. See *Los Angeles Deed & Mortgage Exchange v. Security Exchange Commission,* 9th Cir. 1960, 285 F. 2d 162, 172.

The Securities Act of 1933.[10] Appellant seasonably objected [R. 4311-4312] to the Court's charge in reference thereto [R. 4267-4268] and assigns said charge as an error in this appeal.[11]

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[10]15 U. S. C. A. §77b(1).

[11]The Court charged [R. 4266, 4267 and 4268] as follows:

". . . Counts One and Two and Counts Four through Seventeen of the indictment each alleges that the defendants devised and executed a scheme to defraud in the sale of 'securities' as defined in Section 2(1) of the Securities Act of 1933, namely, 'investment contracts, promissory notes, evidence of indebtedness and receipts for and guarantees of such securities.' . . .

* * *

". . . Section 2(1) of the Act defines the term 'security' to include 'any note, evidence of indebtedness, investment contract, receipt for or guarantee' of any such security.

* * *

"Going back to the charges under the Securities Act, the requirement that the government establish that the Secured 10% Earnings offered by the defendants involved the sale of securities will be established if you find that the trust deed notes or trust deeds are 'notes' or 'evidence of indebtedness,' as defined by the Act."

Appellant objected to this charge [R. 4311-4312] as follows:

"Mr. Dunn: With reference to the Court's instructions as to the term 'security,' specifically since the court has included notes, I would like to call attention to the fact that notes are not within the accepted application of the statute. Although I know that the terms are that broad, they have not been applied that broadly. They have been confined to an investment contract, as I had urged the court at the beginning. I think that we might have avoided that trouble—

The Court: That is true. But the government would not take that position, and since the government has taken this position, I think, Mr. Dunn, since the definition is as it is, I am going to follow it.

Mr. Dunn: I have my exception, then, your Honor, that without referring to the exemptions which might apply, this is an erroneous instruction."

Appellant also asked that the Court instruct that the only type of security involved was that known as an "investment contract" [Clk. Tr. 487]:

"In determining whether there was a violation of the Securities Act you must first find that the Defendants, or any one of them, engaged in the offer or sale of securities.

The criminal action had been preceded by a civil action filed and prosecuted in the Federal Courts by the Security and Exchange Commission against Appellant David Farrell and others. A full recitation of the allegations, issues, opinions and events of that action is not required for the purposes of this brief, but are available for review in the published reports.[12] It is important to note, however, that almost without exception all of the acts or omissions charged against Appellant in the present indictment fell within the time period when the SEC was militantly and relentlessly demanding ultimate and terminal legal sanctions against LATD, TD&ME, David Farrell and others. This was from March, 1958 when the first SEC complaint was filed until June 8, 1960. Further, the anti-fraud structure of the civil action and the testimony and exhibits offered by the SEC in that action to support its allegations therein were qualitatively, but by no means quantitatively, similar to the anti-fraud structure and

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There are a number of different types of securities, however, you will only be concerned with the type known as an investment contract.

If you find that the transactions charged were not investment contracts, then you must find the Defendants not guilty of violations of the Securities Act in Counts One to Seventeen, inclusive."

[12]See *Los Angeles Trust Deed & Mortgage Exchange v. SEC*, 9th Cir. 1959, 264 F. 2d 199, where this court reversed the District Court's issuance of a preliminary injunction and the appointment of a temporary receiver. After a full trial, the District Court rendered its decision, findings of fact and conclusions of law in May, 1960. See *SEC v. Los Angeles Trust Deed & Mortgage Exchange, et al.*, U. S. D. C., S. D. Calif., CD, 1960, 186 Fed. Supp. 830. This judgment, except as to the liquidation powers of the receiver, was affirmed in an opinion of this Court November 23, 1960 set forth in 285 F. 2d 162. Rehearing denied January 10, 1961; cert. denied May 8, 1961, 366 U. S. 919, 81 S. Ct. 1095, 6 L. Ed. 2d 241.

evidentiary pattern of the instant criminal case. Despite this obvious similarity, the Government sought in the criminal case to introduce in evidence the civil case[13] and specifically the pleadings, the Judgment of May 20, 1960 and the prefatory remarks of the trial Judge of May 4, 1960,[14] The Appellant at all times objected [R. 270, 2870-2874] and the Court reserved ruling and the matter was further discussed between Court and counsel. Finally, again over the objection of the defendants [R. 3026, 3029-3031], the Court read to the jury its condensation of the prior civil action and its outcome. The Court charged the jury that the evidence was of restricted use.[15] This action by the Court is assigned as error.

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[13]And did so in the opening argument [R. 32]:

"You will hear later in this regard how there was litigation going on during this time with the Securities and Exchange Commission charging (1) You people are dealing in securities, (2) You are defrauding people, and also you are insolvent."

[14]A certified copy of the original complaint, Exhibit 5201 for identification; a certified copy of the amended complaint, Exhibit 5200 for identification; copy of the answer Exhibit 5200-A for identification; and a copy of the Honorable Thurmond Clarke's May 4, 1960 indication of ruling, Exhibit 1950-A for identification [R. 2869-2870]. Exhibit 1950 was offered and received provisionally [R. 269]. It was Judge Clarke's judgment of May 20, 1960 granting the injunction and appointing the receiver.

[15]"The Court: Members of the jury, in lieu of the acceptance in evidence of Exhibits 1950, 5200, 5201 and 1950-A, I will give you a summary of some of the facts in such exhibits which I deem of possible relevance or materiality for your consideration.

"On March 24, 1958, the Securities & Exchange Commission filed a complaint against Los Angeles Trust Deed and Mortgage Exchange, Trust Deed & Mortgage Exchange, Trust Deed & Mortgage Markets, David Farrell, Oliver J. Farrell, Roy A. Bonner, and Thomas Wolfe, Jr., charging the defendants with violation of certain sections of the Securities Exchange Act, including charges that defendants were engaged in transactions, practices and a course of business which operated and would

The prior civil action cast its long shadow even deeper into the criminal action. It is without dispute that from May 4, 1960 and up to June 8, 1960, the day the Federal Receiver took over LATD, TD&ME and other affiliated companies, the Appellant continued in business on advice of counsel expecting to appeal the decision. There was during that period an avalanche of requests by former purchasers of trust deeds from LATD, that LATD either sell for them or buy from them their trust deeds. There is no dispute that from approximately the first week in May, 1960 until June 7, 1960, close to $3,000,000.00 worth of such liquidation requests or sell orders had been processed by LATD and that approximately 800 more sell orders amounting to approximately $3,630,000.00 remained unprocessed [R. 2798]. The Government on the subject of liquidation requests and dollar volume thereof

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operate as a fraud and deceit upon purchasers of such alleged securities.

"On October 8th, 1958, the Commission filed an Amended and supplemental Complaint charging the corporate defendants with misappropriation of funds entrusted to them by investors under the Secured 10% Earnings Program, and further charged that said corporate defendants were insolvent and unable to meet their current obligations. The Amended Complaint included as a party defendant Stanley C. Marks.

"The charges in both the original and the Amended and Supplemental Complaint were denied by the defendants.

"On May 20, 1960, a judgment was entered in said proceedings permanently enjoining the defendants from engaging in the acts as charged. The effect, however, of this injunction was stayed—that is, put off—by an appeal.

"Pursuant to the judgment the Receiver took charge of the assets and business of the corporate defendants on June 8, 1960.

"Now, neither the charges made in the pleadings in such case nor said judgment are to be considered by you as evidence of the truth of such charges. The above statement of facts is given to you solely in connection with your consideration of the charges made in Paragraph 11, Count One, of the indictment." [R. 3026-3028.]

had testify Mr. Leroy H. Cole an accountant hired by the Federal Receiver. Mr. Cole was allowed to testify to the dollar volume and the Government, over objection, introduced a summary of said liquidation requests [R. 2800-2801: Ex. 6002]. Mr. Cole testified the underlying documents in support of Exhibit 6002 were in the courtroom [R. 2798]. The Government at first asserting it had no intention of introducing the so-called underlying documents (consisting of two baskets of papers) had them marked for identification as Exhibit 6003 [R. 1664, 2789], but suddenly offered said exhibit in evidence in addition to the summary. Over the objection of the defendants[16] the exhibit was admitted. In connection therewith the Court itself attempted to lay a foundation for said exhibit.[17] The exhibit contained far more than just liquidation requests for there were also writings, letters and at least in one instance, apparently, a newspaper clipping quoting the Hon. Thurmond Clarke's remarks of May 4,

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[16][R. 2795, 96, 99]:

"Mr. Jacobs: We would object to them, if the Court please, on the ground that they are incompetent, irrelevant and immaterial and no proper foundation.

* * *

"Mr. Jacobs: Your honor, we object to it on the grounds that there is no proper foundation. Especially, in looking at 6002, and the dates, apparently, that are put in here, they are all late in June, or June 6th and 7th, and certainly would not be admissible in that regard unless there was a foundation as to the time the requests were received."

[17][R. 2799]:

"The Court: Were these requests part of the books of the company when you went to make the audit at the time you assisted in taking over? Were they in the possession of the company at that time?

The Witness: They were in the possession of the company.

The Court: The objection is overruled, to 6003."

1960 in connection with his anticipated ruling in the civil action. A copy of Judge Clarke's actual May 4th remarks had theretofore been offered by the Government as Exhibit 1950A and had been rejected [R. 2869-2870] (the statement of May 4, 1960 appears in 186 F. Supp. 830). As shall be more thoroughly set forth in argument, these writings were of the most objectionable nature—heresay, accusatory, violent and inflammatory. No foundation whatsoever was laid for these extra-judicial assertions and the admission of said exhibit is assigned as error. Extensive argument on this subject was had in reference to a motion for new trial. The motion was denied [R. 4348-4350, 4359-4361].

In light of the fact that the Receiver had taken possession of TD&ME and LATD and the affiliate companies on June 8, 1960, there soon developed in the criminal trial a problem concerning the admissibility of evidence of events occuring after June 7, 1960. The defendants' position in substance was that they could not and should not be held responsible for such events nor should evidence be admitted referring to such events since the defendants were thereafter powerless to act or to control the affairs of the companies.[18] Discussions between Court and counsel soon developed concerning the admissibility of evidence as to events occurring subsequent to June 7, 1960.[19] The Court's

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[18]A forecast of this problem was made by Appellant's attorney in his opening argument [R. 100-101] and it next came to issue [R. 1048] in a discussion concerning the admission of a post-receiver notice of default of a deed of trust owned by a customer witness.

[19][R. 1088]:

"Mr. Dunn: It was my understanding from that that we would not go into matters after June 8, 1960. However,

rule [R. 1293] on this problem was employed fairly by the Court in all save one situation—the most vital of all—where customer-witnesses were asked if they

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they were gone into. It got into the record as it stood, and we would like to reserve our rights and make any proper motion to strike. But at this time I would like to also move that the Government be instructed not to attempt to present matters regarding defaults and what occurred to the property after June 8, 1960, when the receiver was in control of Los Angeles Trust Deed & Mortgage Exchange.

That would be a general motion, because I assume—

* * *

"The Court: . . .

Now, I would like to just hear from the Government as to how you believe that that can have any relevancy or materiality whatsoever. After all, if there was an insolvency on the date of the receivership, that is it. If something else was caused or happened after that time, what difference does it make?

Mr. Medvene: If the court please, that wouldn't have anything to do with the insolvency. What that testimony would have to do with, your Honor, is whether in truth or in fact the trust deeds were actually prime, trouble-free, well-screened trust deeds. And we think the evidence that the trust deeds were delinquent—not because of any condition necessarily of LATD, but were delinquent because of the nature or type of property that they were put on, and that this had relevance in relationship to the program as it was presented to the potential investor.

The Court: The ultimate question, though, would be the nature of the trust deeds as of the date of receivership rather than what happened later, Mr. Medvene, because I think we all have to recognize that the appointment of a receiver is necessarily going to affect the value of whatever the security might be, if they had anything to do with it. *So I really think that our basic problem is what were the values as of the date of the receivership and before that time.*" (Emphasis added.)

* * *

[Continuing R. 1092]

"The Court: I am still going to hold my reservation of ruling on it. I think Mr. Medvene, you may be getting into dangerous territory.

* * *

The Court: I will still reserve my ruling and let us keep away from that during the course of the day here,

ever got their money back. The Court not only allowed such questioning, but suggested the propriety thereof as a means of saving time.[20] On one occasion the Court

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and I will think about it over the week-end and we will have a ruling on Monday.

* * *

[which the Court did R. 1293]:

"The Court: All right.

With reference to the general line of testimony that is before and after the receivership, gentlemen, I don't believe at this time, at least, that I can adopt a general rule on that. I believe that under some circumstances such evidence is admissible, such as *United States vs. Tellier,* 255 F. 2d 440, 448, 449. In other cases it has been held inadmissible. And the reason for the distinction between the two becomes obvious to anyone who would read the cases.

So for that reason I feel that I cannot adopt a general rule on it, although to say this: *That generally speaking what happened after that time, except insofar as it might be declarations against interest, or something such as that, why, it would seem to be inadmissible, or that it wouldn't have any particular relevancy or materiality . . .*" (Emphasis added.)

[20] [R. 1479-1481]:

". . ., it would seem to me that a great deal of time could be saved by just asking the witnesses direct questions as to the amount of money they put in and under what circumstances they put it in *and whether they ever got it out,* and the type of trust deeds . . . (Emphasis added.)

* * *

[R. 1516]:

"The Court: . . . If you want to ask him if he got the money back. . . .

Q. By Mr. Schulman: Did you receive your investment back from the Los Angeles Trust Deed & Mortgage Exchange, sir?

Mr. Jacobs: I object to that for the reason, your Honor, it would be a question of whether he received his funds as represented prior to June 7, 1960.

The Court: This might be some evidence of the condition of the company at the time. The objection is overruled.

Did you receive your money back? Answer the question Yes or No. That is the question. As I say, I think you have already answered it, but answer it again for counsel.

foreclosed any cross-examination of a customer-witness who had testified on direct to losses to show he actually had not or need not have lost at all, or that the loss suffered was due to events occurring after June 7, 1960.[21] On only one occasion on this subject did the

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The Witness: No, I only received a small part of it back.

Q. By Mr. Schulman: Did you receive a full-term 10% return on your earnings. sir? A. While it was invested in the company up to this date that you mentioned, yes, I did. Since then, no."

[21] [R. 1517]:

"By Mr. Jacobs: Q. You made a remark, sir, that you had sustained certain losses. The fact is that any loss you sustained, or I assume you have sustained, was subsequent to the time that the receiver took over the Mortgage Company; isn't that correct?

Mr. Schulman: An objection, your Honor. This is the same conclusion that I believe Mr. Jacobs objected to before.

The Court: I will sustain the objection."

This ruling was discussed later [R. 1540-42] and the Court said:

"The Court: . . .

"What I am attempting to hold it to here is that I believe the Government has a right to show that these people did not get all their money back, and that the particular witness has a right to express his opinion, since he is the owner of the property, after looking back on it as to the value and as to whether it was valueless or whether it was not. That is the position of the court at the present time, and I am trying to hold it to that June 7th date.

* * *

I think we all recognize—certainly I do—that even though it might be a prime second trust deed, the fact that insolvency occurred of some kind and that that paper was still in the possession of the company might affect the market value of that second trust deed.

* * *

The Court: I recognize that, but I will stay with my original cutoff date there, the date of the receivership. It is the values as of that date, and although information might have been obtained later, it would be the values as of that date. I will stay with those rulings."

Court actually limit inquiry so as to effectively comply with its own rule that events occurring after June 7th were inadmissible.[22] The Court gave a charge to the jury which may be asserted as having cured any error on this subject but as will be pointed out in argument did not do so.[23]

Thus, throughout the trial, the Government effectively wove into the framework of the evidence and the minds of the jurors, testimony of customers to the effect that as of the time they were then testifying (*i.e.* March or April, 1962), they had not as yet received back their money.[24]

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[22][R. 1847]:

"The Court: No, counsel. You may ask *if he tried* to get it back and *when,* and then you will keep within the rule on it." (Emphasis added.)

[23][R. 4304]:

"The evidence in this case of a bankruptcy or a receivership of LATD&ME is not to be considered by you as evidence of the guilt of any one or more of the defendants or evidence on any other issue in the case.

You shall disregard any evidence or testimony of Los Angeles Trust Deed & Mortgage Exchange and affiliated companies to the effect that a loss was suffered after June 7, 1960. The defendants are not charged with responsibility for acts occurring after that date."

[24]EPPLEY [R. 775]:

"Q. *Did* you *ever* receive that money, Mrs. Eppley? (Emphasis added.) A. No I *haven't.*" (Emphasis added.)

MARTENS [R. 1017]:

"Q. *Did you ever get back* your money from Los Angeles Trust Deed & Mortgage Exchange? (Emphasis added.) A. No, sir; I didn't; not one dime."

BROOME [R. 1126]:

"Q. *Have you ever received* any or all of the money which you paid into or deposited with Los Angeles Trust Deed & Mortgage Exchange back from the company, sir? (Emphasis added.) A. Any or all?

Q. Any part or all of the monies which you invested with the company, *did* you ever receive it back? (Emphasis

Note: This Appellant does not assert insufficiency of the evidence simply in recognition of the limited role a reviewing Court has in such a situation. While it is true it cannot be said as a matter of law there was no evidence nor inference drawable therefrom sup-

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added.) A. I never received a cent back from the company . . ."

HENNO [R. 1147]:

"Q. Did you ever receive all or any portion of your $1,000 deposit back from L. A. Trust Deed? A. No.

Q. Did you ever receive any part of any earnings back from L. A. Trust Deed? A. No."

FREEDMAN [R. 1499-1500]:

"Q. By Mr. Schulman: . . . 'we have charged your account $3,470.86,' did you ever receive that $3,470.86 back from this investment? A. No. I lost it.

* * *

[R. 1506]:

"Q. Did you ever receive your money out of this trust deed investment, sir? A. No. I lost it.

* * *

[R. 1508]:

"Q. Sir, the cash to you on this was $1,582.52. Did you receive the full amount of your investment back? A. No. I suffered a partial loss.

* * *

[R. 1511]:

"Q. The cash to you on this of or, for $601.35, did you ever get back that investment or any part of it, sir?

A. Not *as yet.* (Emphasis added.)

* * *

[R. 1516]:

"The Court: . . .

If you want to ask him if he got the money back—I think you have already asked him.

Q. By Mr. Schulman: Did you receive your investment back from Los Angeles Trust Deed & Mortgage Exchange, sir?

Mr. Jacobs: I object to that for the reason, your Honor, it would be a question of whether he received his funds as represented prior to June 7, 1960.

The Court: This might be some evidence of the condition of the company at the time. The objection is overruled.

The Court: Did you receive your money back? Answer the question Yes or No. That is the question. As I say,

porting the verdict, the evidence was weak and attenuated on the one real issue involved in the whole long trial—intent. To make a judgment of a person's intent so intimately involves a trier-of-fact's likes or dislikes,

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I think you have already answered it. But answer it again for counsel.

The Witness: No, I only received a small part of it back.

Q. By Mr. Schulman: Did you receive a full-term 10% return on your earnings, sir? A. While it was invested in the company up to this date that you mentioned, yes, I did. Since then no."

HLAVKA [R. 1802]:

"Q. . . . Referring to the $1,000 on that receipt that you are holding in your hand, and any other monies that were indicated on the condensed summaries which you received monthly, have you ever received any of that back? A. No, I didn't. . . ."

LEES [R. 1831]:

"Q. How much of that ten thousand three hundred thirty-six odd dollar figure have you ever received back from Los Angeles Trust Deed & Mortgage? A. Nothing."

YOUNGS [R. 1840]:

"Q. Have you ever gotten a cent back, Mr. Youngs? A. No, sir."

CAMPBELL [R. 1856]:

"Q. By Mr. Schulman: Relating to this amount on this May 31st, did you ever receive that amount of money or any other amount of money back from L. A. Trust Deed? A. Not a cent."

SCHANZ [R. 1877 *et seq.*]:

"Q. Mr. Schanz, did you ever receive a penny back on this trust deed?

Mr. Jacobs: I object to that, if the court please. There is no foundation laid for it from a time standpoint or whether any demand was made.

The Court: Ask him the question if he ever asked for any of it back.

The Witness: No, I never got any money back.

Q. By Mr. Medvene: Have you ever gotten anything back on it? A. No I haven't.

Mr. Jacobs: I don't think the question that was referred to, your Honor, that we were talking about was asked him. I didn't hear it.

The Court: Did he ever ask for anything back?

Mr. Medvene: *He never asked prior to the receiver.*

any error which raises the wrath of the jury and thus destroys its objectivity must be considered egregious, prejudicial and reversible. Appellant urges this Court to review the whole record not unmindful of its great

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The Court: Would you ask him the question if he ever asked for it back.

Q. By Mr. Medvene: *Did* you *ever* ask for anything back prior to the receiver. A. No, I never did.

Q. *Have* you *ever* gotten anything back on this *now*? A. No."

LIST [R. 1905]:

"Q. *Have* you *received* all of that money back *yet,* sir? A. I received papers—

Mr. Jacobs: Just a moment.

The Court: Did you receive the money back is the question.

The Witness: No, I didn't."

DAVIS [R. 1967-68]:

"Q. *Did* you *ever* get a cent out of this? A. No."

COOK [R. 1980-81]:

"Q. *Have* you *ever* gotten a cent back from this investment? A. None whatsoever.

* * *

Q. *Have* you *ever* gotten a cent back on this property? A. Nothing at all.

* * *

Q. By Mr. Medvene: *Did* you *ever* get anything back on this? A. Nothing at all."

WEGNER [R. 1996-97]:

"Q. *Have* you *ever* received a cent back on this investment? A. No sir."

PEARSON [R. 2023]:

"Q. *Did* you *ever* get back your $28,000, sir, from the company? A. No, sir."

LIBBY [R. 2182]:

"Q. I am referring now to after you made your last deposit, the last $1,547. A. Yes.

Q. Did you receive any of your principal back from the company? A. No."

LEHMBERG [R. 2280]:

"Q. *Did* you *ever* get that money back from the company? A. None of it."

BILLINGSLEY [R. 2762]:

"Q. *Have* you *ever* received any of your principal back from the company? A. I have not."

size and seeming complexity, because it is felt by doing so the prejudicial impact of the errors will become obvious.

Actually the trial of this case was remarkable in several ways, the most noteworthy of such is the astounding fact that there really is not much conflict as to the evidence. The operations and activities of TD&ME, LATD and Appellant from January, 1958 to June 8, 1960 and what was or was not said and done were really basically agreed to. An agreement, however, which carries with it no concession that a scheme or conspiracy to defraud ever actually existed. The few areas of dispute and how, if at all, these areas were resolved by the jury is not really opened to review.

Thus there is no question Appellant was the founder, president and guiding hand of the activities of TD&ME and LATD etc., and that he took a significant part in controlling every phase of the business and in the presentation of its image, product and services to the public. The brochures and their evolution during the 13-months until the green "export" copy [Ex. 1668] was sent out and after which little or no changes were made is without dispute.[25]

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[25]There was a glut of documentation in this case and there were brochures in evidence in abundance. It is suggested that a good working set of brochures adequate to the needs of the reviewer on this appeal would constitute the following: White Brochure (Dec. '58—Mar. '58) Exhibit 1666 and DF DO; Black Brochure (July-Oct. '58), Exhibit 844; Green Brochure (Feb.-July '59) Exhibit 1668, 1669; Blue Brochure (July '59 —May '60) Exhibit 1670, 1674.

No dispute existed as to wording of monthly Topics and condensed summaries, letters of welcome to new customers, sale confirmations, Appellant's joint venture and trust agreements with subdividers, appraisal reports and news, radio and TV commercials; nor is there any dispute that such documents were sent out, existed, were used and entered into.

There is no dispute that virtually every act complained of was done during the very time when the Securities and Exchange Commission was undertaking its lawsuit with the express aim of liquidating the Appellant's business. It is without dispute that a Receiver took over June 8, 1960 pursuant to the Court's order of 18 days previous. Nor is there any dispute that the Appellant continued in business during that period of time and were advised by attorneys to do so.

Further recital of evidence agreed upon would seem unnecessary and merely re-emphasizes the fact that the only issue for determination was with what intent Appellant acted. The errors herein assigned, considering all of the circumstances which attended the trial of this matter, constituted prejudicial error and had they not occurred the jury would have acquitted.

Assignment of Errors.

I.

The Court erred in its instruction on the issue of security under The Security Act of 1933 on Counts One, Two, Four through Seventeen.

II.

The Court erred in allowing introduction of any evidence of the existence of the prior civil action or the issues involved therein and its determination. There was also error in the phrasing of the Court summary and in the Court's failing to instruct at that time the difference between the burdens of proof in the two actions.

III.

The Court erred in allowing any testimony of losses by customer witnesses in that such evidence was (a) immaterial and irrelevant to the crimes alleged and (b) violative of the Court's own ruling in reference to events occurring after June 7, 1960.

IV.

The Court erred in admitting Exhibit 6003 in evidence.

ARGUMENT.

I.

The Court Erred in Its Instruction on the Issue of Security Under the Security Act of 1933 on Counts One, Two, Four Through Seventeen.

In reference to Security Counts, the Court instructed the jury that in order to sustain all or any one of these counts under The Securities Act it was essential that the jury find not only that the defendants devised and engaged in a scheme to defraud by use of the mails, as alleged in the indictment but also that the scheme to defraud involved the sale of securities as defined by the statute and alleged in the indictment [R. 4267].

The Court then instructed that Section 2 (1) of the Act defines the term "security" to include any note, evidence of indebtedness, investment contract, receipt for or guarantee of any such security [R. 4267, lines 13-16].

After stating the contentions of the respective parties as to whether or not the various instruments offered, sold and issued in connection with the enterprise constituted securities within the confines of the definition, the Court instructed as follows [R. 4268]:

> "Going back to the charges of The Securities Act, the requirement that the Government establish that the Secured 10% Earnings offered by the defendants involved the sale of securities will be established if you find that the trust deed notes or trust deeds are 'notes' or 'evidence of indebtedness' as defined by the Act.
>
> "Regardless of whether or not you find the trust deed notes or trust deeds are 'notes' or 'evidence of

> indebtedness' within the applicable statute, you may find the instrument should be classified as 'investment contracts' and therefore securities within the applicable statutes.
>
> "The term 'investment contract' is not defined in the Act. There are, however, certain guide lines for you to follow in determining, . . ."

The Court set out what is considered to be those guide lines in determining whether the instruments should be classified as "investment contracts" [R. 4268-4271] and added [R. 4272]:

> "You need only find that the instruments here in question constituted securities under any one of the several definitions I have given you and not all of them or more than one of them."

The Appellant's requested instruction and exceptions to the actual instruction are set out in footnote 11, *supra.*

While discussing with the Court the proposed instructions on this point, counsel for Appellant made it abundantly clear that defendants contended that "trust deed notes" were not the "notes" embraced by the definition of a security; that the activity as a whole, the procedure in offering certain services over and above the mere sale of a trust deed, might warrant an instruction on an "investment contract" but that the trust deed notes, in and of themselves, without the surrounding activity, would not constitute securities [R. 3701-3703].

During the same discussion the Government stated its position that even without the indicia of an invest-

ment contract it would be possible to have a note or other evidence of indebtedness which would be a security [R. 3703-3704].

While noting that the Government was going out on a limb in this regard the Court stated that it would simply follow the definition set forth in the Act [R. 3704-3705].

Appellant contends the instruction that the sale of a "security" would be established if the jury should find that the trust deed notes or trust deeds were "notes" or "evidence of indebtedness" as defined by the Act was erroneous in two respects:

First: The trust deed notes or trust deeds, in and of themselves, were not, as a matter of law, "notes" or "evidence of indebtedness" within the meaning of the Act;

Second: Neither "notes" nor "evidence of indebtedness" are defined by the Act and the Court gave the jury no definition or other guide by which to determine whether the trust deed notes or trust deeds were such "notes" or "evidence of indebtedness" as to make them securities within the meaning of the Act.

Basically, Appellant's contention here is, as it was in the trial court, that the only charge should have been with regard to the type security known as an "investment contract"; that the alternative given, wherein the jury could find the trust deed notes or trust deeds to be securities without the indicia of an "investment contract" was not only confusing and misleading but also an erroneous statement of law.

Those common law characteristics of a promissory note, which might render it a "note" within the statutory definition of a "security", have been destroyed in California by various Legislative enactments with reference to purchase money deeds of trust. Under the successive amendments to Section 580(a), 580(b), 580(d) and Section 726 of the Code of Civil Procedure of the State of California, the maker of a purchase money deed of trust has no personal liability or obligation of any sort. The holder of the trust deed has no remedy or recourse against the maker. The trust deed becomes not an evidence of indebtedness but merely evidence of a charge or lien against the land. Where there is no debt as such, there can be no evidence of indebtedness. The cases of *Brown v. Jensen*, 41 Cal. 2d 193; *People v. Davenport,* 13 Cal. 2d 681, and *Nicholl v. Ipsen,* 130 Cal. App. 2d 452, support this interpretation of purchase money deeds of trusts in California. It is recognized that the decisions of State Courts would not be controlling with respect to the interpretation of a Federal statute. (*L.A. Trust Deed & Mortgage Exchange v. SEC,* 264 F. 2d 199, 211). However, it is submitted that the Federal Courts are bound by the decisions of the highest Court of this State defining rights and liabilities under California law arising from a California contract or statute. If the California law declares that a promissory note, given in a purchase money transaction, should have none of the common law characteristics of a promissory note, the Federal Courts should not decree that it is still the common law "note" presumably intended by Congress when it classified a "note" as a "security".

Many of the trust deeds finally evolved had no separate note at all [R. 2529-2530: Ex. 407 at R. 2292]. It would be absurd to classify a document as a security merely because one permissible form was used in lieu of another when, irrespective of whether a note does or does not exist with the trust deed, it has the identical legal function, force and effect and is similar in all respects.

The same issue was before this Court in *L.A. Trust Deed & Mortgage Exchange v. SEC,* 264 F. 2d 199, and this Court specifically stated that it was not reaching the question as to the character of that which was sold. However, for the edification of the trial court, certain guide lines were set forth as follows (*ibid.,* p. 212):

> "We suggest that a proper determination of this case requires a factual finding, in the Court below, as to whether there was an investment 'in a common enterprise' and whether the purchaser 'is led to expect profits solely from the efforts of the promoter or a third party.' [*Securities and Exchange Commission v. W. J. Howey Co.,* 1946, 328 U.S. 293, 298-299, 66 S. Ct. 1100, 1103, 90 L. Ed. 1244] There must also be a consideration of the various other elements which cause or bar the recognition of a document, plan, course of dealing or program, as a security — all factors leading to an ultimate conclusion as to whether or not that which is here sold is subject to the Act."

Such a mandate to the Court below, we submit, would not have been given if this Court had considered the second trust deeds "notes" or "evidence of indebtedness" within the meaning of the Act.

Upon the conclusion of the trial the matter again came before this Court in *L.A. Trust Deed & Mortgage Exchange v. SEC,* 285 F. 2d 162. The first question raised was whether that which was sold was a security within the Act. The SEC contended that the sale constituted more than a simple sale of second trust deeds — an interest in real property; that what was really involved was an investment contract (p. 166). The Court cited, discussed and relied upon two Supreme Court cases to guide it in solving the problems (*SEC v. C. M. Joiner Leasing Corp.,* 320 U. S. 344; *SEC v. W. J. Howey Co.,* 328 U. S. 293). With these guides in mind, and upon a review of the evidence, the Court held that the Appellants — by their representations to the public, created and constituted the second trust deed notes securities subject to the Act (pp. 171-172). The Court concluded on this point as follows:

> "The terms of the offer, the plan of distribution, the economic inducements held out to the prospects, the results dependent on one other than the purchaser, the common enterprise, *all combine herein to make the second trust deed notes 'securities' as* that term has been defined by the Supreme Court." (emphasis added).

Implicit in this holding is recognition that the second trust deed notes, in and of themselves, were not securities. It was the overall activity in connection with the marketing of such instruments which combined to bring them within the reach of the Act. It was the presence of the indicia laid down in *Joiner* and *Howey* which made the second trust deed notes "securities".

The Court's charge to this jury on this basic issue was at best equivocal and constituted prejudicial error.

The jury was instructed that the sale of a "security" would be established if it found that the trust deed notes or trust deeds were "notes" or "evidences of indebtedness" as defined by the Act. No definitions were given and no guide lines were set forth to illuminate the meaning of "notes" or "evidences of indebtedness".

Although the Court instructed the jury at length on the tests to determine whether that which was sold was an "investment contract", and for that reason a security, the jury was left with a simple alternative requiring only a finding that a trust deed note was a "note". The adequacy of the instructions given on the tests for an "investment contract" is moot since the jury armed as it was with what was tantamount to an invitation to find the trust deeds to be "notes" under the Act, undoubtedly never reached the more involved decision posed by the "investment contract" issue. This seems more compelling in consideration that for some six weeks the jury heard the word "note" perhaps a thousand times.

The basic issue as to Counts One, Two and Four through Seventeen was whether or not that which was sold constituted a "security".

A conviction ought not to rest on an equivocal direction to the jury on a basic issue. Where there are erroneous instructions on a basic issue, a conviction cannot be sustained on some other theory even though the Appellate Court is left with no doubt that the defendant is guilty. *Bollenbach v. United States,* 326

U. S. 607, 613; *Weiler v. United States,* 323 U. S. 606, 611; *Yates v. United States,* 354 U. S. 298, 327.

Cf. Roe v. United States, 5th Cir. 1961, 287 F. 2d 435, 440, where the Court said relative to an instruction which substantially instructed a verdict:

> ". . . No fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our Federal system, the trial court may never instruct a verdict in whole or in part."

II.

The Court Erred in Giving a Summary of a Prior Civil Action Which Had Been Initiated Against the Defendants by the Securities and Exchange Commission to the Jury and Further Erred in Not Giving a Cautionary Instruction After Having Given the Summary of the Civil Trial.

The questions here are (1) whether a judgment in a prior civil case is admissible in a subsequent criminal trial involving the same parties, and was it proper to give a summary of the judgment in the prior civil case in the instant action. The summary was given by the Court [R. 3027] (see footnote 15, *supra*), and (2) having given the summary did the Court properly instruct the jury as to the different burdens of proof required in civil cases and criminal cases.

A. The giving of this summary constituted plain error (18 U. S. C. A., Rule 52, see Appendix). There is no question but there had been a civil trial, but in examining paragraph 11 of Count One of the indictment one finds that the indictment was artfully drawn for the express purpose of laying the founda-

tion to bring in the highly prejudicial, inflammatory and immaterial evidence of the judgment in the prior civil matter.[26] The Government apparently contends that the defendants had a duty during all of the civil proceedings to somehow advertise and advise every customer or prospect that they were being accused of fraud, deceit and misappropriation of their customers' funds and this failure to so advise itself amounted to constructive fraud. That is to say, that the failure of the defendants to advise everyone of the accusation in the civil matter, even before the civil matter was litigated

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[26]Clerk's Transcript, Vol. 2, p. 128, paragraph 11. (Paragraph 11, Count one of the Indictment.)

"It was further an element of said scheme and artifice to defraud that the defendants in order to deceive and mislead investors, and to induce them to invest and re-invest under said secured ten per cent earnings program, would and they did falsely and fraudulent represent to investors that the secured ten per cent earnings program constituted a legal and legitimate investment program which conformed to all applicable laws, and that "legal aspects of all ten per cent earnings accounts have been evaluated and approved by counsel for the company, Mr. Morgan Cuthbertson former counsel for the Securities and Exchange Commission", when in truth and in fact, as the defendants well knew, but concealed from and omitted to state to investors, TD&ME, LATD&ME, TD&MM and the defendants David Farrell, Oliver J. Farrell and Stanley C. Marks were defendants in an action brought by the Securities and Exchange Commission, an agency of the Government of the United States, charged with the administration and enforcement of the Federal Securities Laws to restrain and enjoin them from engaging in acts and practices in violation of the registration and anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 for the appointment of a receiver for TD&ME, LATD&ME and TD&MM based on allegations of fraud, deceit and insolvency; and it was further an element of said scheme and artifice to defraud that, after trial on the issues existing between the Securities and Exchange Commission and the said defendants, in the course of which defendants' course of fraud, deceit and misrepresentation was exposed, and the defendants would and they did continue to solicit and accept

and judgment rendered, amounted to fraud. Whereas, in truth and in fact, such litigation, including all of the pleadings and allegations were and always have been a matter of public record, and it is further submitted that this civil case was given excessive publicity in newspapers and magazines and on radio and television throughout the United States. This, in effect, would effectively deprive the defendants of their property and livelihood without due process of law.[27] They were placed in a position of either flying a red banner over their doors to the effect, "we are accused of fraud, deceit and misappropriation of our customers' funds, but we still would like to do business with you", or the alternative, of closing their doors and ceasing to do business without having their day in court, or being allowed the due processes of law to determine whether they were or were not to be put out of business by the Government. This is manifestly unjust, unfair and effectively prevented the defendants from having a fair trial in the criminal proceedings.

B. The Court further committed error in giving its summary of the civil trial in not at least instructing on the different burden of proof required in a civil action from that required in a criminal action.[28] As early

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deposits of funds from investors under the secured ten per cent earnings program, without disclosing or making known to such investors the nature and import of the proceedings brought by the Securities and Exchange Commission, or the fact that the funds deposited by investors under the secured ten per cent earnings program might be made subject to administration in the course of receivership.

[27]United States Constitution, 5th Amendment.

[28]*Roe v. U. S.*, 5 Cir. 1961, 287 F. 2d 435:

". . . More than that, this being a criminal case in contrast to the more common injunction proceeding or damage suit under the Act, two principles inescapably apply. First, in

in the trial as the opening statement, Counsel for the Government stated to the jury:

> [R. 32] "You will hear later in this regard how there was litigation going on at this time with the SEC charging, (1) you people are dealing in securities; (2) you are defrauding people; and (3) also, you are insolvent."
>
> [R. 43, 44] "Also, in regard to the litigation pending, think and determine whether the investors were fully informed of the facts when though there was pending litigation charging both the fact that they were dealing with these securities, and fraud and insolvency, the policy was not to tell investors anything at all about the litigation unless they asked. And if they did ask, to tell them that it was just a jurisdictional dispute to see if the type thing that LATD was selling should be handled by the Securities and Exchange Commission.
>
> "Listen closely with regard to whether the investors were told anything about whether there were any charges of fraud and insolvency, regardless of whether they were true or not. Think about whether these investors should have known at least there were charges. Think about whether they should have been able to make their own investigation, possibly. Think about whether they were fully apprised of the facts."

Mr. Justice Jackson's words "in a civil action * * * a preponderance of the evidence will establish the case; * * * in a criminal case, [the evidence must] meet the stricter requirement of satisfying the jury beyond a reasonable doubt." 320 U. S. 344, 355, 64 S. Ct. 120, 125.

One can readily imagine the cumulative damage done by the jury hearing this in the opening statement and then having the judge give the summary, in effect confirming what had been said. It is true that the judge stated that "neither the charges made in the pleadings in such case nor said judgment are to be considered by you as evidence of the truth of such charges." [R. 3027]. This would obviously be closing the gate after the horse has escaped. The difference between the burden of proof required in a civil action and that required in a criminal action is so great that the Court committed grave error when it failed to thoroughly instruct the jury of the difference in the burden of proof. In a criminal action the burden is always on the Government to prove the guilt of the defendant beyond a reasonable doubt. To sustain the burden the Government must prove guilt by substantial evidence, excluding every other reasonable hypothesis than that of guilt.

Fotie v. United States, 8th Cir. 1943, 137 F. 2d 831;

Cataneo v. United States, 4th Cir. 1948, 167 F. 2d 820;

United States v. Bruno, 3rd Cir. 1946, 153 F. 2d 843.

In a civil matter the plaintiff merely has the burden of showing that he is entitled to win.

Pacific Portland Cement Company v. Food Machinery and Chemical Corporation, 9th Cir. 1959, 178 F. 2d 541.

The Court should have given the jury further instruction concerning the fact that the Government in the case at hand has a much greater burden in order to prove that the defendants should be found guilty of the crimes as charged and its failure to do so seriously prejudiced the defendants.

Roe v. United States, 5th Cir. 1961, 287 F. 2d 435 (see footnote 28, *supra*).

C. It is a well settled rule that evidence of a civil judgment will not be admitted into evidence in a criminal matter and conversely, evidence of a criminal verdict will not be admitted in a civil matter.

Monte Green v. State of Indiana, 184 N. E. 183, Ann. 87 A. L. R. 1251.

A case dealing with criminal prosecution of an officer of a bank for receiving a deposit with knowledge of the bank's insolvency a few days before the instituting of receiver proceedings and the prosecution attempted to introduce the records of a prior civil proceeding for the appointment of receiver. It was held that the records of a prior civil proceeding was inadmissible. The Court here correctly pointed out the difference in the burden required in a civil case and that required in a criminal case. The Court pointed out that what might be insolvency and a failing condition sufficient to allow the appointment of a receiver in a civil action, might not be sufficient to establish insolvency insofar as a criminal proceeding is concerned.

It might be said that a judgment is always admissible into evidence to prove the fact of its existence and that it was actually rendered by a Court of competent jurisdiction. In the instant action there had been no final adjudication and, in fact, the judgment which was not entered until May 20, 1960 enjoining the defendants in the civil action was stayed and the injunctive action by the Court further stayed by the Appellate Court although the Receiver went into possession on June 8, 1960. It is inconceivable that the mere fact that there was litigation pending could by any stretch of the imagination be material in the instant action when final adjudication in the civil matter did not occur until long after the Receiver took over control of LATD, and add to that the fact that the Court failed to properly instruct the jury and you have serious error which in and of itself should be grounds for reversing this verdict to provide the Appellant a fair and impartial trial.

Appellant respectfully points out that this summary by the Court was given to the jury at the close of, or immediately prior to, the close of the Government's case. When one considers that the jury received the summary concerning the civil action from the Court and then was allowed to read the contents of the newspaper article using the language of Judge Thurmond Clarke in Exhibit 1950-A for identification, it is evident that the jury was in possession of the ingredients which when mixed rendered a conviction an absolute certainty without the benefit of a free and impartial weighing of the evidence of the jury, and it is apparent that the dangerous ingredients were well mixed in the jury room to produce a grossly unfair decision.

III.

The Court Erred in Allowing Any Testimony of Losses by the Customer-Witnesses in That Such Evidence Was (a) Immaterial and Irrelevant to the Crimes Alleged and (b) Violative of the Court's Own Ruling in Reference to Events Occurring After June 7, 1960. The Instruction of the Court Did Not Cure the Error.

The cutting edge of the Government's case was the selectivity with which customers were chosen to testify and the channels into which the adroit questioning led. The cutting effect of this edge was honed to a sharpness against which there was no effective defense.[29]

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[29]The staging of select witnesses has been deplored by eminent jurists. See concurring opinion of Judge Frank in *United States v. Grayson,* 2d Cir., 1948, 166 F. 2d 868, 870. There the prosecutor had elicited only three bits of inflamatory evidence: did a victim have a son in the service: had a victim paid defendant all that she had in the world and was victim married and did she have a husband in the service. The Judge excoriated this practice:

> "Whether any one of those errors standing alone would be enough to require reversal need not be considered. But combined, I think they deprived defendant of a fair trial; they come within the recent rulings of the Supreme Court defining prejudicial as distinguished from harmless error. The able and conscientious trial Judge, patently troubled by this unfairness, once severly criticized government counsel out of the presence of the jury, regularly directed the improper testimony to be stricken, and gave disregarding instructions. I think, however, he should have gone further and declared a mistrial. *For the objectionable answers, once given, had such a character that no one can say that the judge's warnings effectively removed their poisonous consequences. Indeed, as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more, to have the judge tell the jury to ignore it—often serves but to rub it in.* I believe that a prosecutor ought not deliberately and repeatedly, as here, put defendant's lawyer in such an awkward dilemma—where his client will suffer if the lawyer does not object or if he does. *If, without attaching any practical consequences to such tactics of the*

The sympathy effect on the jury of the testimony of Mr. Lees [R. 1806] who was 69 years of age, hard of hearing and unemployed; of Mr. Campbell [R. 1846-1847] who was 87 years of age and whose wife had to go to the County Hospital; of Mr. Schanz [R. 1820] who was 72 years of age, hard of hearing and obviously a man of no formal education; of Mrs. Hlavka [R. 1789] a widow; of Mrs. Eppley [R. 719] a 72 year old widow, was overwhelming. It was calculated to be.

Neither allegations nor proof of losses or that any one was actually defrauded was required. *Bobbroff v. United States,* 9th Cir. 202 F. 2d 389; see also *Hermansen v. United States,* 5th Cir. 1956, 230 F. 2d 173. If such testimony was unnecessary it was therefore immaterial; why then did the Government try to prove the unnecessary? The only answer is that it was calculated to engender sympathy for the alleged victims and conversely antipathy against the defendants whose guilt or innocence the jury was soon to be called upon to judge.

It will be argued that Appellant's counsel by failing to object waived the objection and perhaps it is well taken. But perhaps the Appellant's attorneys were impaled on the horns of the dilemma noted and severely criticized by Judge Frank.

However, were this the only ploy used by the Government the severity of the error would not be so compelling. But, coupled with the finale scheduled for each witness' testimony as to not getting his money back,

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prosecutor, we simply express disapproval of them, we do nothing to prevent their repetition at the new trial of this case or in trials of other cases." (Emphasis added.)

the net effect was overwhelmingly prejudicial. There was a further ground upon which losses were inadmissible. This arose out of the fact a receiver took over a going business and the defendants had no control of events thereafter. The Court, as pointed out above, attempted to establish the date of take over by the Receiver as an effective barrier beyond which neither the Government nor the defendants would go. Admittedly, much evidence of events that occurred after the Receiver was rejected.

However, on evidence of customer losses, this salutary barrier simply did not exist for the Government and it was free to roam on up to as late as the very day that the witness was testifying almost two years beyond the cutoff date. At the same time Appellant was effectively blocked in his pursuit of such evidence in order to rebut it. This was the source of constant objection and discussion with the Court as seen above.

There can be no doubt of the validity of Appellant's position on the need for an effective cutoff date. However, the administration and application of the rule, as applied on evidence of losses, was manifestly unfair. The maximum latitude that can be said to be allowed to the prosecution in this case would be to inquire *if* the customer had *tried before June 8, 1960* to convert his position to cash and if he had, what happened? The Court, on one occasion, suggested this as representative of its ruling but it was observed only in the breach by the prosecution.

Finally the question is asked if the Court's instruction [R. 4304] was not curative of the problem. That the Court was concerned with the admission of loss

testimony is evident not only from the discussion [R. 3614] but also from the attempt by the Court to correct the error with an instruction withdrawing customer losses entirely from the jury's consideration [R. 4304]:

> "You shall disregard any evidence or testimony of Los Angeles Trust Deed & Mortgage Exchange and affiliated companies to the effect that a loss was suffered after June 7, 1960. The defendants are not charged with responsibility for acts occurring after that date."

Unfortunately, the Court omitted four words contained in the copy of his proposed instructions given to Appellant's counsel. In the copy the instruction was worded as follows:

> "You shall disregard any evidence or the testimony *of any customer of* The Los Angeles Trust Deed & Mortgage Exchange and affiliated companies to the effect that a loss was suffered after June 7, 1960. The defendants are not charged with responsibility for facts occurring after that date."[30]

The omitted words were indispensable to the instruction. Without them it was meaningless much less helpful in curing the error. Since there had been no testimony of Los Angeles Trust Deed & Mortgage Ex-

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[30]The inclusion of the four words on the judge's proposed instruction and omitted in his actual instruction were contained in a copy of the judge's proposed instruction turned over to Appellant's present counsel by former counsel. It is assumed that the Government's copy of the proposed written instructions also contained these four words and, unless the government takes a contrary position in its reply brief, it will be assumed to be a correct statement of the occurrence.

change there was really nothing for the jury to disregard.

It is submitted, however, that even had the judge read his proposed instruction correctly it would not have undone the severity of the error.

Cf. Lockhart v. United States, 9th Cir. 1929, 35 F. 2d 905, citing with favor *Waldron v. Waldron,* 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453. See also the dissenting opinion of Judge Frank in *United States v. Antonelli Fireworks Co.,* 2nd Cir. 1946, 155 F. 2d 631, for an exhaustive treatise on the subject of prejudicial misconduct and error. See also Judge Frank's concurring opinion in the *Grayson* case, *supra. Cf. Kotteakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Bihn v. United States,* 328 U. S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485; see also *Bollenbach v. United States,* 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *Weiler v. United States,* 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495, 156 A. L. R. 496; *Bruno v. United States,* 308 U. S. 287, 293, 60 S. Ct. 198, 84 L. Ed. 257.

If it is argued that any objection to the wording of the instruction on loss was waived because Appellant's counsel did not take exception thereto, it is respectfully submitted the omission of the four words went unnoticed by any one in the courtroom, including the judge for it seems clear the Court was concerned about the error. The failure to catch it was excusable.

In summary, it is submitted that the errors complained of were prejudicial and constitute sufficient grounds standing alone to warrant reversal. Obviously the error was not corrected by the Court's instruction;

nor could any instruction have cured the error already created in the jury's mind. Furthermore the error when taken in conjunction with the other errors assigned, make it clear Appellant did not receive that which he deserved—a fair trial.

IV.

The Court Committed Plain Error in Allowing the Introduction of Plaintiff's Exhibit 6003.

Exhibit 6003 was originally presented to the court in a box containing two baskets filled with approximately 800 so-called "sell orders," each of which was basically a small sheet of yellow paper instructing LATD to liquidate the customer's account. The actual request to liquidate may be a document which would be kept as a matter of routine business practice. However, Exhibit 6003 is found to contain in addition to the business form, hundreds of personal letters written in longhand or typed from customers to LATD and in addition, containing numerous notations by parties unknown. The most shocking item found in Exhibit 6003 was a newspaper clipping containing the same prejudicial and inflammatory language as Exhibit 1950-A for identification, which was offered by the Government into evidence, but was rejected by the court at [R. 2870]. The letters are from various customers of LATD and a cursory examination of these letters will readily disclose that they contain highly inflammatory and prejudicial material in addition to being hearsay in the extreme (see appendix summary).

Exhibit 1950-A for identification appears to have been a copy of a document indicating the way the trial judge would rule in the civil case tried prior to the

instant action entitled "Securities and Exchange Commission v. Los Angeles Trust Deed & Mortgage Exchange, et al.," 187 F. Supp. 830 (9th Cir.), using the same language as that used by the Honorable Thurmond Clarke in said case (see Appendix p. 28 stating the language which appeared in Exhibit 1950-A). This comment by Judge Thurmond Clarke was of a highly inflammatory nature and this newspaper article alone is so prejudicial that it in itself would be sufficient to incite the jury to such anger as to render it impossible for them to sit in calm, dispassionate judgment of the defendants, rendering a fair and just verdict impossible. In addition to the contents of Exhibit 1950-A for identification the hundreds of letters from customers containing highly inflammatory, prejudicial and hearsay evidence would, to say the least, be sufficient to cause members of the jury to become inflamed to such an extent that they could not render an unbiased, unprejudiced decision. This appellant desires to point out the following sequence of events which occurred during the course of the trial which set the scene for the court allowing Exhibit 6003 into evidence [R. 1664]. Counsel for the Government addressed the court concerning Exhibit 6003 to the effect that the box he was talking about containing the liquidation records was not going to be introduced into evidence in the case, but was just marked.

> "We don't intend to use anything in that box, Sir." [R. 1665].
>
> "We are not going to introduce them and take the time of the court, but we just wanted them available to defense counsel."

Again, at [R. 2871] counsel for the Government stated, referring to Exhibit 1950-A for identification (rejected by the court at [R. 2870]), the language of which was contained in a newspaper clipping in Exhibit 6003.

> "It isn't the language that we are interested in, Sir. We will knock all that out. It is just that we cover in some instruction the significance of the date bearing on the good faith of the defendants, that date along with the May 20th date."

Again [R. 2789], referring to the so-called documents in Exhibit 6003:

> "We don't intend to put any of these things in. I am just trying to clear what they are. I won't put these in, but I want the witness to testify from them so it is clear what he is talking about."

Then at [R. 2793] the Government suddenly produces a summary prepared by Witness Leroy Cole, designated Government's Exhibit 6002 [R. 2793], which purported to be a list of customer demands for liquidation prepared by Cole after the Receiver took over on June 8, 1960. The Government offered Exhibits 6002 and 6003 into evidence [R. 2795-2796] and an objection by the defendants was sustained by the court on the grounds that Exhibit 6002 and Exhibit 6003 were based upon certain documents which were not present in court. The court then allowed Exhibit 6003 and Exhibit 6002 into evidence after asking these questions:

> "Were these requests [Ex. 6003] part of the books of the Company when you went to make the audit at the time you assisted in taking over?

"Were they in the possession of the Company at that time?"

An affirmative answer was received from the witness. At the same time the court overruled the objection of the defendants that there was no proper foundation, and that Exhibit 6002 and Exhibit 6003 were irrelevant and incompetent [R. 2799-2801]. The court then immediately instructed the jury [R. 2800] that Exhibit 6002 would be admitted but that Exhibit 6002 was not evidence in itself; that if there was *any evidence or anything of materiality or relevancy* (emphasis added), it would be in connection with Exhibit 6003 that Exhibit 6002 was merely a summary for convenience if the jury wanted to use it for that purpose.[31] Later, as if to compound the emphasis the court [R. 4007-4008] again admitted Exhibit 6003 into evidence.[32]

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[31] [R. 2800]:

"The Court: It will be admitted but the jury is instructed that it is not evidence in itself. If there is any evidence, or anything of materiality or relevancy which you will consider, it is in connection with 6003. That is, 6002 is merely a summary for convenience, if you want to use it for that purpose. 6002 is admitted."

[32] [R. 4008]:

"Q. By Mr. Dunn: I place before you Government's Exhibit 6003—

I assume that is in evidence, your Honor.

The Court: Would you check, Mr. Clerk?

Mr. Medvene: If it is not in, the Government would offer it at this time so the question can be asked.

The Court: Let's see if it is in.

Mr. Dunn: It is my understanding that the summary is not in.

The Court: I am not certain which.

Mr. Medvene: The summary is not in—the summary is in, but I don't think the Exhibits are in. The Government would move them in at this time.

The Clerk: I don't have them in, your Honor.

The Court: All right. Admitted."

Keeping in mind the statements and representations by Government counsel that they were not going to put the mass of material contained in Exhibit 6003 into evidence and the strict admonition by the court [R. 3043-3044][33] directing the Government to excise

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[33] [R. 3043-3044]:

"Mr. Dunn: Prior to recess, may I mention one thing, your Honor?

The Court: Yes.

Mr. Dunn: I wish to take exception to the court's requirement that the defendants have counsel over the weekend look at the documents which have been provisionally admitted on this ground: That as early as January of this year, in our first pretrial conference, these objections were raised and called to the attention of Government counsel prior to entering into any stipulation, and then we were put under a rule that until we stipulated to certain documents, we could not see additional documents. We wasted hours and hours.

Now, we have an entire weekend of work planned, with very little rest, your Honor, and to be here at that time will hamper the defense immeasurably, and I believe that it is an onerous burden to place on us when the Government knew of these objections and knew they were going to be made and made no provision to take care of them prior to presenting these documents to the court.

Therefore, I vigorously object to that requirement being made at this time.

The Court: I will rule promptly on it. It won't be necessary that defense counsel be here. I place on the Government the burden of the removal of the objectionable material.

Mr. Dunn: Thank you, your Honor.

The Court: Is there anything else before the recess?

Mr. Medvene: Just as a matter of good faith, your Honor, we will take off the material that it is our understanding is objectionable, and if there is any question about that, I think the ball will then have to be passed to the defendants.

The Court: We will settle that right now.

Mr. Medvene: Yes, sir.

The Court: You take the exhibits and remove the material. After all, the ruling of the court has not been too specific on that, either. Remove the material now, whatever seems to be outside of the document itself, writings that seems to be outside of the documents and to which

all extraneous and immaterial matter from the various multi-page exhibits prior to it being given to the jury, it becomes obvious that Exhibit 6003 should not have been admitted into evidence and submitted for examination by the jury in its then condition containing the innumerable immaterial, irrelevant, incompetent, inflammatory and hearsay items. The court apparently felt that Exhibit 6003 was the type of document which would come within the provisions of 28 U. S. C. §1732. (see Appendix p. 30). It appears that the court, basing its ruling upon the representations of Government counsel and Government Witness Cole, and having in mind the fact that the court had admonished and directed the Government that it [the Government] had the duty to excise all extraneous immaterial matter from the exhibits before giving them to the jury [R. 3043-3044], committed serious error in allowing this highly prejudicial mass of material to be dumped into the lap of the jury.

It is respectfully submitted that the court committed further error in admitting Exhibit 6003 on the following additional grounds:

(a) Exhibit 6003 was not a business record, but was merely hearsay, containing information and docu-

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objection was taken, and then keep those documents separate and apart, and at a proper time we will submit those documents to counsel for the defendants. Then we may have the objections to any material that has not been removed.

Mr. Medvene: Yes, sir, the only reason that we made our request, sir, was we didn't want to touch the documents unless the defendants were present.

The Court: That is all right."

ments which even the Government and the trial judge knew and admitted should be excised, which information and documents were all so inflammatory and prejudicial that they themselves could, and probably did, cause the jury to convict the defendants. Exhibit 6003 contained letters from customers which obviously were not records of the defendants and should not have been admitted as a business record.

Amtorg Trading Corporation v. Higgins, 2d Cir. 1945, 150 F. 2d 536.

In the *Amtorg* case the court held that letters and statements from buyers to the seller that the buyer had paid excise tax on certain goods imported from Russia, did not come within the category of "business records", hence were inadmissible hearsay in the prosecution against the seller.

A memorandum or record cannot be considered as having been made in the regular course of business within the meaning of this section relating to admissibility of business records unless it was made by an authorized person to record information known to him or supplied by another authorized person.

Standard Oil Company v. Moore, 9th Cir. 1957, 251 F. 2d 188, Cert. den., 78 S. Ct. 1139, 356 U. S. 975, 2 L. ed. 1148;

Schmeller v. United States, 6th Cir. 1944, 143 F. 2d 544.

In the *Schmeller* case the court had before it a situation involving prosecution by the Government for manufacturing defective war materials. The trial court admitted enmasse, Exhibits 1 to 46 constituting a group of documents, some unsigned and some containing hearsay matters taken from the files apparently kept in the regular course of business. The court held that the mere fact that paper offered into evidence is taken from a business file and is otherwise acceptable, does not render or establish its competency and that such should have been excluded. The court should have ruled upon each paper separately and should have excluded the hearsay and other incompetent evidence. In the instant action Exhibit 6003 appears to contain nothing but hearsay since most of the liquidation requests were prepared by the customers themselves and would obviously contain hearsay matter, but assuming for the sake of argument that the liquidation requests themselves were relevant, material, competent and not hearsay, all of the other documents attached to the liquidation requests were so clearly irrelevant, immaterial, incompetent, inflammatory and so violative of the hearsay rule that they should have been excluded. It is further pointed out that the actual liquidation requests constitute a mere fraction of the substantial bulk of Exhibit 6003.

(b) It is further respectfully submitted that the liquidation requests themselves, excluding all of the letters, notations and other extraneous matters, were im-

material in the instant action because a simple examination of the record discloses that the liquidation requests were apparently offered to show that the defendants were unable to liquidate a customer's account according to the wording of the brochures. These liquidation requests did not tend to prove or disprove any issue in the case. Exhibit 1668, which is the so-called green export brochure sent out to all past and present customers and prospects of the defendants, clearly sets forth that liquidation or sell orders will be handled "on a best effort basis only." It is clearly set forth in Exhibit 1668 that LATD did not guarantee anything except "best efforts." This language is also contained in Exhibits 844, 1670, 1673 and 1674 (see Appendix pp. 34, 35). There is no evidence or testimony in the entire record indicating that "best efforts" were not used. Why would the fact that a substantial number of sell orders came in between May 3, 1960 and June 7, 1960 (one day before the Receiver took over) be material to any issue in this case They would be no more material than a sell order or a liquidation request received after June 8, 1960. Further, there is no evidence nor exhibits indicating on what date liquidation was to take place. Apparently the liquidation request cut-off date was arbitrarily determined by the court to be June 7, 1960, but there is nothing in the record to support this arbitrary action.

(c) The allowing of Exhibit 6003 into evidence after the Government advised repeatedly that it was not

going to submit the exhibit into evidence and was not going to use it [R. 1664, 1665, 2871 and 2789] and without the Government excising the immaterial prejudicial inflammatory items included in 6003, even though ordered to do so by the court [R. 3043-3044], so greatly prejudiced the position of the defendants that it cannot be considered mere harmless technical error; rather it was so grave as to effectively deprive the defendants of a fair and impartial trial. When one reads the highly inflammatory, to say the least, immaterial and hearsay matters contained in the letters from various customers to the defendants contained in 6003, it becomes obvious that a fair trial was impossible, especially after the court instructed the jury that the summary, Exhibit 6002, was not the evidence, but that they were to look to 6003 as being the real evidence. Appellant respectfully submits that the items contained in Exhibit 6003 were not documents kept or maintained by the defendants in the routine course of business, that they were immaterial, irrelevant, incompetent and hearsay and that further, they were so highly inflammatory and prejudicial as to tip the scale by passion and prejudice in a case which was finely balanced. The question is what effect did the error have, or reasonably may be taken to have had, upon the minds of the jurors in the total setting. Here one pictures the jury, its attention focused on this exhibit not only by its appearance but by the court referring to it as primary evidence, reading hundreds of letters from

irate customers, elderly people, people who claimed to have put their moneys into LATD to provide for their children, who needed the money for illness, and every other pathetic situation one can imagine, and then one can readily see that it was impossible for the jury to have a clear and impartial mind with which to approach the problem of weighing the evidence in this case.

(d) It is further respectfully submitted that Exhibit 6002 is not a true summary of Exhibit 6003 as represented to the court by Government witness Cole.[34] Had Exhibit 6002 been a true summary of the content of Exhibit 6003, the Court would have rejected both Exhibit 6002 and Exhibit 6003. For Exhibit 6002 to be a true summary of Exhibit 6003 would require a complete summarization of all items contained in Exhibit 6003. Unless the Court examined Exhibit 6003 in detail there would be no way for the Court to be made aware of its true contents (see Appendix pp. 21-27).

Witness Cole testified that Exhibit 6002 was a synopsis of "demands" contained in Exhibit 6003 [R. 2793] and at [R. 2794] sell orders contained in Exhibit 6003 are "summarized" in Exhibit 6002. At [R. 2797] Cole testified "we made a summary of the requests for liquidation that were on hand on June 8th"

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[34]Webster's New 20th Century Dictionary, Unabridged, defines the term SUMMARY as a short, abridged, or condensed statement or account; an epitome or abstract; an abridgement or compendium containing the sum or substance of a fuller statement.

and the court apparently believing that Exhibit 6002 was truly a summary of all the contents of Exhibits 6003 admitted the exhibits. Appellant submits that Exhibit 6002 was not a summary of Exhibit 6003 using the plain definition of summary nor was it a summary in actuality since it contained no reference to the many items contained in Exhibit 6003.

Conclusion.

A sound argument in support of Appellant's position is contained in the whole record if approached and reviewed with a calm objectivity. It is a large record to review, yet the issues are grave involving as they do a severe loss of liberty. Perhaps it is with this sense of urgency that the arguments made herein have been presented and in that light, if excessive, can be understood and forgiven.

The points raised herein are valid and warrant reversal.

The errors expressed merely indicate ideas which can find sound support in the record as a whole. Appellant respectfully urges that the Court reverse the conviction and return the matter to the Court below to be disposed of with complete fairness and finality.

Respectfully submitted,

James A. Poore and
Robert G. Clinnin,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES A. POORE,
Attorney.

APPENDIX.

Index of Exhibits.

Code of abbreviations: "P" admitted provisionally
"I" marked for identification

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Impeachment Exhibits

Summary of Information in 6003.

The following is a summary of information contained in Exhibit 6003 listed by account number, customer's name and date, giving a brief statement as to the contents set forth in the innumerable sell orders or requests for liquidation:

No. 4703 — Joseph Pearson, letter dated May 6, 1960, reference by customer to a newspaper article by Judge Thurmond Clarke.

No. 4496 — Chester F. Gellibray, letter dated May 9, 1960 to effect that customer put their money in to purchase a home.

No. 4901 — Virginia Shannon, letter dated June 6, 1960, which is handwritten by customer stating she has lost three members of her family and desperately needs the money which she has on deposit with LATD.

No. 4842 — Ray E. Bardin, letter dated May 23, 1960, which is written by customer in longhand, requesting that money be returned "for sure" this time.

No. 4830 — A. C. Hillman, letter dated May 6, 1960, which contains a reference to Judge Clarke's statement.

No. 4994* — Arthur D. Terflinger, letter dated May 6, 1960, written in longhand by depositor who states that the depositor is 74 years old and cannot afford to lose this great sum.

No. 2815 — Thomas M. Cagle, letter dated May 7, 1960, which contains notation that the customer needs the money to buy a new home.

No. 2777* — Floyd W. Lemons, letter dated May 23, 1960 is a handwritten letter that the customer is getting married and needs the money to purchase a house.

No. 2742* — J. E. Whiston, letter dated June 2, 1960, which is handwritten from the customer that the customer needs the money to put their mother in a nursing home.

No. 3440* — Mary E. Spilman, letter dated May 17, 1960, which contains correspondence from a lawyer and another letter.

No. 3812* — Thomas Watson, letter dated May 25, 1960 stating that the customer needs the money to help his brother who is very ill.

No. 1300 — Customer Whittaker, letter dated May 10, 1960, complaining that the customer was told that customer could get his money back within a couple of days.

No. 1366 — J. W. Benjour, letter dated May 10, 1960, stating that the defendants attempted to prevent liquidation of the customer's account in the sum of $54,000.00.

No. 1680 — Russell Smith, letter dated May 31, 1960, written in longhand complaining that the customer is unable to get money as promised.

No. 2045 — Customer Rothwell, letter dated May 9, 1960 stating that the customer was told that he could withdraw his money within a very short time.

No. 2291* — Chester Jones, letter dated May 26, 1960 stating that customer has lost his job and needs the money.

No. 2417* — John T. Argus, letter dated May 17, 1960 containing the statement, "trusting in you as before."

No. 2954* — Customer Leslie, letter dated May 16, 1960 stating that the customer is in the midst of a dire emergency.

No. 20479 — Peter Bell, letter dated June 3, 1960, referring to the litigation and newspaper articles.

No. 9735 — Customer Slabicki, letter dated June 6, 1960 written in longhand and stating that customer is in need of money.

No. 9832 — Alice Fleming, letter dated May 27, 1960 stating that customer is faced with an emergency and needs money.

No. 9893 — Abraham Koretski, letter dated June 1, 1960 stating to the effect that there is illness in the family and the customer needs his money.

No. 9920 — Customer Page, letter dated May 25, 1960 stating that customer has just invested his money and wants it back.

No. 20175 — Customer Yunch, letter dated June 1, 1960 relating that he is faced with an emergency and needs money immediately.

No. 20208 — Forrest Class, letter dated May 25, 1960 stating that he needs money and he never got his trust deed.

No. 20414 — Customer Padden, letter dated June 6, 1960 written by an obviously uneducated person, asking for money and telling Mr. Farrell that he should not be afraid.

No. 20850 — Customer Mann, letter dated May 19, 1960, stating that he is faced with an emergency and needs his money.

No. 20874 — Customer Heiter, letter dated June 6, 1960 stating that it is urgent and needs money.

No. 6909 — Edwin S. Hanna, D.D.S., letter dated May 6, 1960 in which he says customer did not get a trust deed on improved property in Orange County and "wants refund according to policy of giving refund at any time."

No. 8185* — Customer Dean, letter dated May 19, 1960 stating that the customer has suffered drastic misfortune and needs money.

No. 8295 — Customer Zeckiel, letter dated May 6, 1960 stating "I had hoped that this would be foundation for Carolyn's (12) college education.

No. 8456 — Customer Wheeler, letter dated May 10, 1960 containing reference to adverse publicity.

No. 8590 — Customer Germain, letter dated May 9, 1960 from a farmer, requesting withdrawal and stating that he had been told he could withdraw funds at any time.

No. 6888* — Customer Moots, letter dated June 1, 1960 containing a notation in handwriting "urgent to Farrell, needs money."

No. 7090 — Customer Miner, letter dated May 24, 1960 stating that the customer had been told he could withdraw money at any time.

No. 7097* — Henrietta Moch, letter dated May 24, 1960 stating customer is sick and was told she could get her money at any time: states that customer cannot work.

No. 7154* — Customer Benjamin, letter dated June 1, 1960 stating that customer is unemployed and needs the money.

No. 7173 — Customer Gebhard, letter dated June 6, 1960 stating that customer's husband is sick and needs the money.

No. 7663 — Customer Edelman, letter dated May 16, 1960 stating that the customer is faced with an emergency and needs the money.

No. 8910 — Customer Pastorelli, letter dated May 24, 1960 stating that customer is faced with an emergency and needs money.

No. 9143 — Eve M. Greene, letter dated May 17, 1960 with a scrap of paper attached to it with printing stating, "your request complete, close out today, wants check by 2:05 20th of this month advise customer impossible."

No. 9151 — Customer Steele, letter dated May 10, 1960 speaking of "investment."

No. 9204* — John R. Clarke, letter dated May 26, 1960 referring to article in the Wall Street Journal and wants money back before it is tied up by the court.

No. 9416 — Customer Brun, letter dated May 23, 1960 to the effect that the customer does not want a subordinated trust deed.

No. 9463* — Elizabeth Smith, letter dated May 27, 1960 stating that customer is unable to work and has her life's savings involved and wants her money back.

No. 9502 — Customer Uranon, letter dated May 24, 1960 referring to liquidation of the corporation (LATD).

No. 5818 — Customer Hoffmeyer, letter dated May 25, 1960 stating that the customer is not happy with the method of operation and wants money back.

No. 5887* — Customer Domitio, letter dated May 31, 1960 stating that the customer is in poor health and needs the money.

No. 6107* — Customer Wurzboch, letter dated May 23, 1960 to the effect that he is too old to acquire real estate; that his wife worries too much; that he needs the money.

No. 6314** — Edmund R. Meitus, letter dated May 5, 1960. This is a very long letter from an attorney by the name of Edmund R. Meitus, severely criticizing the manner of operation of LATD and demanding his money back. Also comments extensively that he doesn't go along with Judge Clarke's judgment in the civil case, but that he still feels that the defendants were not operating correctly. Attorney Meitus was a customer of LATD.

No. 6675* — Customer Olsen, letter dated May 24, 1960 stating he has incurred substantial doctor bills and needs the money immediately.

*Appellant does not set forth all of the letters contained in Exhibit 6003 but has merely, as the Government stated in its opening Statement [R. 33] selected a sampling of letters as just part of the entire picture presented in Exhibit 6003. Each letter has been pointed out for the purpose of giving the court a different aspect as to the over-all tremendous impact contained in Exhibit 6003 and denotes letters which would move the most hardened heart to extreme compassion.

**This letter would obviously have a devastating effect upon the minds of the jurors. It is a detailed attack on the operations of LATD from a person who was not only an attorney, but was a customer of LATD.

Newspaper Article.

LOS ANGELES HERALD EXPRESS
U. S. JUDGE BLASTS
"TEN PER CENTERS"

Blasting at so-called "10 per centers who mislead countless small investors," Federal Judge Thurmond Clarke today ordered the Securities and Exchange Commission to file their conclusions and proposed judgment in that field.

The action was taken in a case involving the Los Angeles Trust Deed and Mortgage Exchange which Judge Clarke has been hearing for the past three months. The commission had asked for a permanent injunction against the firm continuing operations except under a receivership.

The Judge said that his order, to be answered by next Wednesday, was not an immediate judgment but he clearly indicated that he would be strongly advised by the pending conclusions of the commission.

ALERTS PUBLIC

Judge Clarke said he wished to alert the public to the dangers of investing in the home building industry by way of the sale of second mortgages, among other schemes, and added:

"These 10 per centers have developed an ingenius and thoroughly devious scheme relying on legal loopholes.

"It is their good fortune that the scheme has not yet come tumbling down around their heads, like the frail cardhouse structure it is.

"This case has unearthed many totally unethical practices which run a very close line between criminal prosecution and civil actions for fraud.

"The court regrets that the processes of law have worked so slowly that the hearth of many innocent investors have been placed in jeopardy," the Judge concluded.

CALLED TEST CASE

Legal experts have termed the trial a test case challenging the right of the regulatory commission to embrace the field of real estate loans.

David Farrell, President of the mortgage exchange firm stated that the record will show "no instance in which we have issued a security or an investment contract."

United States Statutes.

28 U. S. C. A. §1732. Record Made in Regular Course of Business: Photographic Copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regu-

lar course of business has caused any or all of the same to be recorded, copies, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413.

18 U. S. C. A., Rule 52 "Federal Rules Cr. Proc. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity of variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

18 U. S. C. A. §1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139 §34, 63 Stat. 94.

15 U. S. C. §77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communica-

tion in interstate commerce or by the use of the mails, directly or indirectly—

(1) To employ any device, scheme, or artifice to defraud, or

18 U. S. C. A. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Exhibit 844.

No. 844 which was a so-called black brochure issued October, 1958, which contains the following language on page 5:

> "We cannot legally make specific guarantees in connection with any of the trust deeds sold to our customers. However, it is our policy to repurchase and/or replace any defaulted trust deeds with a trust deed in good standing, when requested by our customers to do so. This is done entirely on a best efforts basis, but to date we have never had a customer of our approved trust deeds sustain a loss nor has any such customer failed to receive his full 10% earnings.

Exhibit 1670.

No. 1670 is a blue brochure issued July, 1959 which contains the following language on page 2 of the brochure at the bottom of the page:

> NOTE: "While this brochure presents the most important points in trust deed investments, it obviously cannot and does not cover the entire subject. We act only as principal, and not as agent. Because no one can actually predict the future, everything that the company does is entirely on a best efforts basis. We do not either expressly or by implication guarantee that any customer will not lose on his investment, nor do we undertake or guarantee to protect any customer from loss. However, since the inception of this company, no customer of our approved trust deeds has ever sustained a loss, nor has any such customer ever failed to receive his full 10% earnings on trust deeds held for at least six months. We do not "pay interest." All 10% earnings which accrue to a customer come to him from the trust deed(s) which he purchases."

No. 1073 is a blue brochure issued February, 1960 which contains the same language as No. 1670.

No. 1674 is a blue brochure issued May, 1960 which contains the same language as No. 1670.

United States Constitution.

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [XIV] Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.